HOW YEW HOCK (SEBAGAI WASI UNTUK YEE SOW THOO @ CHOR SIEW THO (P))

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

FEDERAL COURT, KUALA LUMPUR
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK)
DATO' PEH SWEE CHIN FCJ
DATO' MOHAMED DZAIDDIN ABDULLAH FCJ
[CIVIL APPEAL NO. 02-372 OF 1994]
30 MAY 1996

EMPLOYEES PROVIDEND FUND: *Nomination of beneficiary by a member - Whether a testamentary disposition - Whether must comply with the Wills Act 1959 - Whether to operate by force of the EPF Act and Regulations - Essence of a nomination - Whether a contractual arrangement and not a disposition - Employees Providend Fund Act 1951 s. 20(b) - Employees Provident Fund Regulations 1969 reg. 9.*

In 1986 one Yew Sow Thoo (the deceased) made a will and appointed her son (the appellant) as executor and trustee thereof. Subsequent to that, pursuant to reg. 9 of the Employees Provident Fund Regulations 1969, the deceased executed Form EPF-4 and by that nominated her daughter as beneficiary of her contributions in the Employees Provident Fund (EPF). By the nomination, the daughter stood poised to receive the amount standing to the deceased's credit in the EPF in the event of the latter's death.

In this appeal, the appellant sought to challenge the validity of the nomination contending that the nomination, being a testamentary document, was void for non-compliance with the provisions of the Wills Act 1959. The appellant further argued that the will, for which he was granted probate in 1991 after the deceased's death, should take precedence over the nomination.The respondent, the Employees Providend Fund Board, maintained that the nomination, having been made under regulations provided for under s. 20(b) of the Employees Provident Fund Act, 1951, operated essentially by force of that Act or the Regulations made thereunder. In any case, they contended that the Wills Act 1959 did not apply and could not invalidate the nomination.

The primary issue that arose was whether the statutory nomination herein was in law a testamentary document that must comply with the Wills Act 1959.

Held:

Per Mohd Dzaiddin Abdullah FCJ (delivering the judgment of the Court):

[1] The nomination was made in the prescribed Form under reg. 9 of the EPF Regulations 1969. It was obvious therefore that the said nomination was a statutory nomination which operated by force of the EPF Act and Regulations and not a testamentary disposition.

[2] There is a vast difference between a testamentary paper and a disposition of a testamentary nature. A testamentary paper must satisfy the Wills Act but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper.

[3] Although the nomination had certain testamentary characteristics, and not least that of being ambulatory, they were insufficient to make the paper on which it it is written a testamentary paper. The nomination not being a testamentary document, it did not have to satisfy the requirements of the Wills Act 1959.

[Appeal dismissed. Judgment of Court below affirmed]

***[Bahasa Malaysia** Translation of Headnotes]*

***KUMPULAN WANG SIMPANAN PEKERJA:** Penamaan benefisiari oleh seorang ahli - Samada satu pelupusan wasiat - Samada harus mematuhi Akta Wasiat KWSP 1959 - Samada beroperasi menurut kuasa Akta dan Peraturan KWSP - Intipati sesuatu penamaan - Samada satu persetujuan kontraktual dan bukannya satu pelupusan - Akta Kumpulan Wang Simpanan Pekerja 1951 s. 20(b) - Peraturan Kumpulan Wang Simpanan Pekerja 1969 per. 9*

Dalam tahun 1986, seorang yang bernama Yew Sow Thoo (simati) telah membuat satu wasiat dan telah melantik anaknya (perayu) sebagai wasi dan pemegang amanahnya. Berikutan itu, selaras dengan per. 9 Peraturan-peraturan Kumpulan Wang Simpanan Pekerja 1969, simati telah menyempurnakan Borang EPF-4 dan melaluinya telah menamakan anak perempuannya sebagai benefisiari kepada sumbangan-sumbangannya dalam Kumpulan Wang Simpanan Pekerja (KWSP). Melalui penamaan tersebut, anak perempuan tersebut adalah berhak untuk menerima jumlah kredit yang ada pada nama simati dalam KWSP selepas kematian pihak yang terkemudian itu.

Dalam rayuan ini, perayu telah memohon untuk mencabar keesahan penamaan diatas dan menegaskan bahawa penamaan tersebut, yang merupakan sebuah dokumen wasiat, adalah batal kerana tidak mematuhi peruntukan-peruntukan Akta Wasiat 1959. Perayu selanjutnya berhujah bahawa wasiat tersebut, bagi yang mana beliau telah diberikan probet dalam tahun 1991 selepas kematian

simati, seharusnya mendapat keutamaan diatas penamaan tersebut. Responden, yang merupakan Lembaga Kumpulan Wang Simpanan Pekerja, berhujah bahawa penamaan tersebut, setelah dibuat di bawah peraturan-peraturan yang peruntukkan di bawah s. 20(b) Akta Kumpulan Wang Simpanan Pekerja 1951, beroperasi secara pentingnya menurut kuasa Akta itu atau Peraturan-Peraturan yang dibuat di bawahnya. Walau apa pun, mereka menegaskan bahawa Akta Wasiat 1959 tidak terpakai dan tidak boleh mentaksahkan penamaan tersebut.

Isu utama yang berbangkit adalah samada penamaan berkanun di sini adalah di sisi undang-undang merupakan satu dokumen wasiat yang harus mematuhi Akta Wasiat 1959.

Diputuskan:

Oleh Mohd Dzaiddin Abdullah HMP (menyampaikan penghakiman Mahkamah):

[1] Penamaan tersebut telah dibuat dalam Borang yang ditentukan di bawah per. 9 Peraturan-peraturan KWSP 1969. Ianya adalah dengan itu jelas bahawa penamaan tersebut adalah penamaan berkanun yang beroperasi melalui kuasa Akta KWSP dan Peraturan-peraturannya dan bukannya merupakan pelupusan wasiat.

[2] Terdapat perbezaan yang luas antara kertas wasiat dan satu pelupusan yang bersifatkan wasiat. Kertas wasiat mestilah memenuhi kehendak-kehendak Akta Wasiat tetapi sesuatu pelupusan mungkin akan mempunyai sifat wasiat yang tertentu tanpa kertas yang mengandunginya merupakan kertas wasiat.

[3] Walaupun penamaan tersebut mempunyai sifat wasiat yang tertentu, dan tidak kurang merupakan sesuatu yang ambulatori, ianya tidak memadai untuk menjadikan kertas pada mana ianya ditulis suatu kertas wasiat. Penamaan tersebut oleh kerana ianya bukan merupakan satu dokumen wasiat, maka ianya tidak perlu memenuhi kehendak-kehendak Akta Wasiat 1959.

[Rayuan ditolak. Penhakiman Mahkamah di bawah diikrarkan]

Cases referred to:
Re Danish Bacon Staff Pension Fund [1971] 1 All ER 486 ***(foll)***
Baird v. Baird [1990] 2 AC 548 ***(foll)***
Re Barnes, Ashenden v. Heath [1940] Ch. 267 ***(refd)***

Legislation referred to:
Employees Provident Fund Act, 1951, s. 20(b)
Employees Provident Fund Regulations, 1969 reg. 9
Wills Act 1959

Other sources referred to:
'The Law of Succession,' Anthony R. Mellows, 4th edn., p. 10

For the appellant - Chan Kok Keong (Ng Sow Han with him); M/s. Chan & Assoc. For the respondent - Mohd. Naim Daruwish SFC (Jamal Nassir Abdul Ghani with him);

JUDGMENT

Mohamed Dzaiddin Abdullah FCJ:

The genesis of this appeal was a will made by Yee Sow Thoo @ Chor Siew Tho (f), deceased, dated 1 August 1986, appointing her son, the appellant, the executor and trustee of the will, and a subsequent nomination of the deceased made in Form KWSP-4 under the Employees Provident Fund Regulations 1969 (EPF Regulations), nominating her daughter, Chong Hui Lee to receive the amount standing to her credit in the Employees Provident Fund (EPF). Then, on 13 February 1987, the deceased passed away. On 10 September 1991, the appellant was granted probate of the said will by Ipoh High Court vide Ipoh High Court Probate Petition No. 32-191-91.

On 20 December 1991, the appellant instituted an action at Ipoh High Court by way of O.S. 24-1050-1991 seeking a declaration that the EPF nomination in favour of the deceased's daughter was null and void on the ground that he nomination did not comply with the provisions of the Wills Act 1959 and that the will should take precedence. On 6 June 1994, the learned Judge dismissed his application with costs.

Both here and in the Court below, the primary contention of Encik Chan was that the EPF nomination was a form of testamentary disposition of the deceased's property, which document must comply with the provisions of the Wills Act 1959. On that premise, Counsel contended that the disposition of the property of the deceased under Regulation 9 of the EPF Regulations was inconsistent with the Wills Act 1959. In the result, the said nomination was null and void and that the will dated 1 August 1986 should take precedence.

In reply, Encik Mohd. Naim submitted that the said EPF nomination was a valid nomination. It was made under regulations provided for under s. 20(b) of the Employees Provident Fund Act, 1951 (Act 272). The section gave the Minister of Finance power to make regulations to provide for the nomination by a member of the Fund of the persons to whom any amount standing to his credit in the Fund at the time of his death was to be paid at his death. Thus, the said nomination was made in prescribed from under Regulation 9 of the EPF Regulations which was duly registered and retained for safe-keeping by the Employees Provident Fund Board. Encik Naim concluded by stating that the Wills Act 1959 did not apply and therefore could not invalidate the said nomination.

On 6 May 1996, we dismissed this appeal and now give our reasons.

The primary issue in this appeal was whether the said nomination under the EPF Regulations was a testamentary document which must comply with the provisions of the Wills Act 1959. Based on the authorities referred to us by Counsel, we had no hesitation in coming to our conclusion that the said nomination was not a testamentary document, although possessing certain characteristics of a will, in particular it is ambulatory until the death of the nominator. Encik Chan was at pain to persuade us to accept his contention that the said nomination was a testamentary disposition and therefore it had to comply with the provisions of the Wills Act 1959. He referred us to *Re Danish Bacon Staff Pension Fund* [1971] 1 All ER 486 and *Baird v. Baird* [1990] 2 AC 548.

According to *'The Law of Succession'* by Anthony R. Mellows, Fourth ed. (p. 10):

> A nomination is a direction to a person who holds funds on behalf of another to pay those funds in the event of death to a nominated person. In many cases, nominations operate by statute ... However, there can also be non-statutory nominations, particularly in connection with pension schemes. The rules of many pension schemes provide, in essence, that if the employee dies during the course of his employment the amount of his contributions will be paid to a person nominated by the employee in writting, and in the absence of any nomination, to the employee's personal representatives. Where a nomination is made, it does not operate as a will. While the document does affect the devolution of property on death, the property passes directly from the fund to the nominee, and at no time forms part of the estate. The nomination operates by virtue of the rules of the scheme, and not as a will, and it does not, therfore, have to satisfy the requirements of the Wills Act.

In *Re Barnes, Ashenden v. Heath* [1940] Ch. 267 at p. 273, Farwell J described a nomination as having the characteristics of a testamentary document. This is what he said:

> I say 'in its nature testamentary', because it has all the characteristics of a testamentary document, that is to say, it is a nomination which has no effect at all until the death of the nominator who is left completely free during his lifetime to deal with his share irrespective of it. The nominee would have no right to complain of, nor could he take any steps to prevent, the nominator dealing with his interest during his lifetime. The nomination has no operation until the death of the nominator. Whether or not it then operates depends upon whether or not the nominator has during his lifetime either revoked it or used the money which he purpoted to nominate for his own purposes, by withdrawing it from the society or in some other way. The result, as I said, is that the nature of the nomination in a case of this sort is clearly testamentary.

The above passage was referred to by Megarry J in *Re Danish Bacon Staff Pension Fund, supra,* which was concerned with a nomination of a staff pension fund under a trust deed, where the rules of a staff pension fund provided for the payment to a member who had left the company's service

without becoming entitled to a pension under the rules or to the personal representatives of a member who died in service of the amount of his contributions together with compound interest. One of the rules of the fund provided that the member might, and must if required by the trustees, appoint a beneficiary to receive that which would otherwise become due to his personal representatives on his death in service. One issue raised by the proceedings was whether a nomination signed in the presence of a single witness was effective or whether it was a testamentary disposition which required to be attested in the same way as a will. Megarry J held that the nomination was effective. In describing the member's interest, he observed, at p. 493:

> What I am concerned with is a transaction whereby the deceased dealt with something which *ex hypothesi* could never be his. He was not disposing of his pension, nor of his right to the contributions and interest if he left the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death.

In summarising Counsel's argument and stating his conclusions on this point, the Judge continued at pp. 493-494:

> First, although a nomination had certain testamentary characteristics, and not least that of being ambulatory, it took effect as a contractual arrangement and not as a disposition by the deceased. The contributions and interest did not come to the deceased and then pass on from him by force of his will or the nomination; they went directly from the fund to the nominee, and formed no part of the estate of the deceased. I may say that I think *Bennett v. Slater* [1899] 1 QB 45 and *Eccles Provident Industrial Co-operative Society Ltd. v. Griffiths* [1912] AC 483, 490 provide some support for this view. Despite certain testamentary characteristics, the nomination takes effect under the trust deed and rules, and the nominee in no way claims through the deceased. Secondly, there is a vast difference, it was said, between a testamentary paper and a disposition of a testamentary nature. A testamentary paper must satisfy the Wills Act 1837; but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper. Indeed, Mr. Godfrey urged that a nomination was *sui generis*, with some of the characteristics of an appointment under a power, some of the characteristics of a *donatio mortis causa*. As Alice said, curiouser and curiouser.
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> I appreciate the force of these arguments. Non-statutory nominations are odd creatures, and the cases provide little help on their nature. I do not, however, think that a nomination under the trust deed and rules in the present case requires execution as a will. It seems to me that such a nomination operates by force of the provisions of those rules, and not as a testamentary disposition by the deceased. Further, although the nomination has certain testamentary characteristics, I don not think that these suffice to make the paper on which it is written a testamentary paper. Accordingly, in my judgment the requirements of the Wills Act 1837 have no application.

In *Baird v. Baird (supra),* the Privy Council had to consider whether a nomination by a member of company pension scheme of a beneficiary to receive the death benefit payable under the scheme on the member's death before retirement constituted a testamentary disposition by the member and was thus invalid unless executed in accordance with the provisions of the Wills and Probate Ordinance of Trinidad and Tobago which followed the provisions of the English Wills Act 1837. The Board held that whether or not the statutory requirements relating to wills applied to a nomination of a beneficiary under a pension scheme depended on the provisions of the particular scheme, but that where a member's interest were non-assignable and approval for making or revoking a nomination of a beneficiary to receive the benefit payable on his death before leaving that employment or retirement would not constitute a testamentary disposition. In so holding, Lord Oliver followed *Re Danish Bacon Staff Pension Fund* where his Lordship concluded (at p. 561):

> The question must depend in each case on the provisions of the individual scheme. No doubt, where the effect of the particular scheme is, as it was in *In re MacInnes* [1935] 1 DLR 401, to confer upon a member a full power of disposition during his lifetime over the amount standing to his credit under the scheme, a disposition of that interest upon his death would normally constitute a testamentary disposition requiring attestation in accordance with the statutory requirements for the execution of a will. But in what is now the normal case of non-assignable interests such as that in the present case and, *a fortiori*, where the power of nomination and revocation requires the prior approval of the trustees or of a management committe, their Lordships see no reason to doubt the correctness of Megarry J's decision in the *Danish Bacon Co.* case.

It should, perhaps, be noted that the above authorities dealt with non-statutory nominations under pension schemes which operate by virtue of the rules of the schemes. Nevertheless, the ratio which emerge from them, in particular that a nomination has certain testamentary characteristics; that there is a vast difference between a testamentary paper and a disposition of a testamentary nature; and that a testamentary paper must satisfy the Wills Act, but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper, are of general importance which we would respectfully adopt in arriving at our decision.

Therefore, in the instant case, it was obvious that the said nomination was a statutory nomination, which operated by force of the EPF Act and Regulations. Section 20 of the EPF Act 1951 empowers the Minister of Finance, after seeking the advice of the EPF Board, to make regulations to provide for the nomination by a member of the Fund of the persons to whom any amount standing to his credit in the Fund at the time of his death is to be paid at his death. Hence, by virtue of this section, the EPF Regulations came into force. The power to make nominations by a contributor of the Fund is provided for under reg. 9. The nomination to be valid must be made in writing on the prescribed form (Form KWSP-4) signed by the nominator whose signature must

be attested by a witness. The form was registered by the EPF Board on 30 October 1986 and retained for safe-keeping until after the deceased's death. In fact, it was not disputed that the said nomination had complied with the aforesaid provisions and was therefore valid.

Next, on the contention of Encik Chan that the disposition of the deceased's property under the EPF Regulations was invalid as it was inconsistent with the Wills Act 1959, we need only say that in view of our above opinion on the primary point that the said nomination of the deceased was not a testamentary document and that it had complied with the provisions of reg. 9 of the EPF Regulations, we found his submission devoid any merit.

For the above reasons, we dismissed the appeal and upheld the decision of the learned Judge. We also ordered costs to the respondent to be taxed, if not agreed, and the deposit to be paid to the respondent to account of the costs.

Reported by W.A. Sharif